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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **STEVEN JAMES CONTESTABLE,** **Defendant and Appellant.**	**A122904** **(Contra Costa County Super. Ct. No. 5-070905-5)**

Defendant Steven James Contestable (appellant) appeals his conviction of first degree murder with use of a firearm resulting in great bodily injury and death (Pen. Code, §§ 187, 12022.53, subds. (b), (c) & (d)).[1] He contends his trial counsel was prejudicially ineffective in failing to object to improper argument by the prosecutor and to inadmissible evidence. We reject the contentions and affirm.

BACKGROUND

This case involves the shooting death of Nicholas Schwind[2] in the early morning hours of January 11, 2006.

Several days before the shooting, on the evening of January 8, 2006, firefighters were called to appellant's Crockett residence in response to a report that his Chevy pickup truck was on fire. Firefighters characterized the fire as "suspicious."

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1 Defendant was sentenced to 50 years to life in state prison.

2 The reporter's transcript also variously refers to Schwind as "Schwinn."

John Sommer[3] testified that at about 10:00 p.m. on January 10, 2006, Schwind met Sommer at a friend's house in Crockett. Schwind and Sommer then left in a stolen blue Chevy pickup truck driven by Schwind. Because the truck was low on gas, they drove around unsuccessfully trying to steal a car. They then parked on Parker Avenue in Rodeo to siphon gas from a white Chevy van parked in a small parking lot. As Schwind began siphoning the gas, Richard Reza, Jr. (Reza), drove up in a Lincoln Navigator and Sommer asked for a cigarette. Reza's uncle, Edward Kizer (Edward),[4] was a passenger inside the Navigator. Reza then sped off and made the first right turn.

As Sommer was pouring the siphoned gas into the pickup truck, appellant (known by Sommer as "Pickle") and Curtis Carr walked toward Sommer and Schwind. Appellant was walking about three paces in front of Carr. Sommer ran and got into the truck, ducked down, and told Schwind to "hurry up and leave." Sommer was fearful of appellant because there was a "misunderstanding" that Sommer and Schwind had set appellant's truck on fire a week earlier.[5] As Schwind put the truck in reverse and started to back up, he was shot at from a distance of about 15 feet. At least 10 shots were fired. Schwind's foot got caught on the gas pedal, the truck "shot out" into the middle of the street, hit a car and stalled. Sommer then got into the driver's seat and drove off. As he did so, Sommer saw appellant and Carr[6] running together down the street and Sommer

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3 At the time of trial, Sommer was serving a three-year prison sentence after pleading guilty to being an accessory after the fact in a different murder case. He testified in this case under a grant of use immunity. He was promised that, if he testified truthfully, his current prison sentence would be recalled and he would receive probation for that offense as well as for pending auto theft and evading police charges in Solano County. In addition, a Napa County probation violation allegation would be dismissed and terminated.

4 The reporter's transcript variously refers to Kizer as "Kaiser."

5 Sommer said he and Schwind had driven by as firefighters were putting out the fire in appellant's truck, but said neither he nor Schwind burned appellant's truck. A couple of days after the fire, Schwind and Sommer were told that appellant believed they had started the fire. They went to appellant's house to talk, but appellant did not answer the door.

6 Sommer recognized Carr by the Oakland Raiders symbol tattooed on Carr's head.

tried to run them over. However, appellant and Carr jumped over a fence and into a baseball field.

Sommer did not want to drive Schwind to the hospital in a stolen truck so he attempted to borrow a "legit" car from his friend, Mitchell Miles. After Miles told Sommer to "just go to the hospital," Sommer sped off to "Doctors Hospital," where he told emergency personnel that his friend had been shot. Later that evening Sommer gave a statement to police. He did not tell the police that appellant had approached the truck because Michael Perrault had just purchased guns and Sommer wanted to "handle it" himself by trying to shoot appellant.

Reza[7] testified appellant was friends with him and his uncles, Edward and Jimmy Kizer. Reza, Sommer and Schwind partied and did drugs together. They received stolen property, and Reza sold Sommer methamphetamine. On the night after appellant's truck was burned, appellant told Reza he wanted to find out who had set it on fire and had heard that Schwind, Sommer and others did it. Thereafter, Reza stayed away from Schwind and Sommer because he was afraid of appellant and some of appellant's friends.

On the night that Schwind was killed, Reza was in his Navigator with Edward, driving in Crockett, when they saw Schwind and Sommer washing a blue pickup truck. Schwind offered to sell Reza some tire rims. Reza and Edward then drove "into town" where they met appellant and Carr. Reza told appellant he had just seen Schwind and Sommer, who had rims for sale. Appellant asked where Schwind and Sommer were because he wanted to talk to them about the rims. Thereafter, Reza and Edward, in one car, and appellant and Carr, in another car, unsuccessfully tried to locate Sommer and Schwind in Crockett and then went to appellant's home.

At appellant's home, appellant and Carr joined Reza and Edward in the Navigator and drove to Rodeo. When they got to Parker Avenue, appellant said, "There they are," referring to Schwind and Sommer. They parked and saw Sommer siphoning gas.

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[7] Reza was arrested for conspiracy to murder Schwind. He was later released without being charged and testified under a grant of use immunity.

Schwind approached the Navigator's passenger side and Reza asked him about the rims. Reza then pulled away from the curb and as he turned right, the passenger and rear side doors opened and appellant got out of the Navigator holding a black semiautomatic handgun. As appellant got out he said to Reza, "Pick me up around the corner." Carr also got out of the Navigator. Appellant and Carr then walked quickly back toward Schwind and Sommer.

Reza then turned left onto Parker Avenue intending to pick appellant up. Reza feared "repercussions" if he left appellant. Reza saw the blue pickup truck speeding down Parker Avenue on the wrong side of the road. He then saw appellant and Carr coming out onto the street and pulled over to let them into the Navigator. Appellant and Carr were out of breath and both were holding black pistols. Carr's hands were bloodied. When Reza asked them what they did, appellant said he "emptied his clip," and said there were 10 bullets in the clip. When Reza asked appellant if he thought he had killed "him," appellant said, "Well, I shot 'em at pointblank range." Appellant's demeanor was "very cold." Reza turned around and drove in the opposite direction on Parker Avenue toward the freeway and dropped appellant and Carr off at appellant's house in Crockett. Reza then drove to his uncle's house. Two or three days later, Sommer called Reza. Perrault took the phone from Sommer and told Reza to give him Reza's truck and $20,000 "or else." Reza told Perrault to come and get Reza's truck if he wanted it. Reza then told appellant about the phone call and appellant responded, "I should have got both of them."

An autopsy revealed that Schwind suffered four gunshot wounds, including two fatal wounds to the chest. The entries of the wound were consistent with the victim being shot while driving and turning around while backing up.

The blue pickup truck sustained bullet holes on the driver's side and windshield and there was damage to the rear of the truck. The prosecution's criminalist opined that based upon the possible trajectories of the shots fired, the shooter was most likely positioned in front of the driver's side of the truck, firing from a distance of five to 30 yards. A spent bullet was found in the Parker Avenue parking lot and ten .40-caliber cartridge casings were found across the street, where the blue pickup had been parked.

The bullets and cartridge casings from the scene and recovered from the victim were all fired from the same gun.

Jason Lewis[8] testified that he is a close friend of appellant and Carr. On January 8, 2006, prior to the time appellant's truck was burned, Lewis and appellant went to Richmond to rob "J-Twin"[9] who "owed [appellant]." Lewis was armed with a gun. They drove to a particular location and waited for someone to deliver methamphetamine. A man approached the passenger window of their truck and threw two baggies of methamphetamine on appellant's lap and said they owed him $1,650. Lewis and appellant laughed and sped off without paying for the methamphetamine. They went to appellant's house and split up the drugs and then Lewis drove to Walnut Creek. Later, appellant called Lewis and said, "They burned my truck, get down here." Appellant was very upset and told Lewis he "wasn't going to stand for it," and Lewis was responsible for half the damages because they had split the drugs. Later, appellant told Lewis he thought the person who burned his truck was from the Crockett area and not from as far away as Richmond. On another occasion prior to Schwind's murder, appellant told Lewis he had pistol-whipped a "youngster" trying to get information about appellant's truck.

About 2:00 or 3:00 a.m., after Schwind's murder, appellant called Lewis and asked to be picked up at a Benicia gas station. En route to Lewis's house in Walnut Creek, appellant said he "took care of what happened to his truck, he handled it." When Lewis asked if appellant had killed Schwind, appellant said he "emptied the clip," and told Lewis to "[w]atch the news." Appellant spent the night at Lewis's house, and the next day Lewis drove him to Crockett. Subsequently, appellant told Lewis he "took care

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8 The district attorney promised Lewis that if he testified truthfully in this case and pled guilty to possession of a controlled substance and possession of brass knuckles he would receive three years' probation and one year in jail. It was also agreed that his sentence would run concurrently with a Solano County sentence for making criminal threats.

9 J-Twin is a nickname for Jason Estrella (Estrella).

of his part," and wanted Lewis to "take care of Sommer," meaning to kill him. Lewis did not agree to do so.

Monica Larson testified that, in January 2006, she was living in Crockett with Siobahn Kelleher and Kelleher's son. Sommer and Schwind were friends with Larson and they spent a lot of time together. Larson was dating Reza. Larson, Reza, Perrault, Sommer, Schwind and Cecil Smith used methamphetamine together. Larson knew appellant because he dated her sister for a short time more than five years ago. And, more than 10 years ago, Dan Abeyta, the father of Larson's son, shot appellant and was prosecuted for doing so.

The day before Schwind was murdered, Smith came to Larson's house. Appellant arrived, grabbed Smith and told him he wanted to talk with him outside. Appellant had a black handgun and was upset, yelling and "very demanding." Smith looked frightened. Appellant told Smith, "You need to come outside because we need to handle this," or "we need to talk." Larson told them to "stop" because Kelleher's child was in the house. After Larson and Kelleher told appellant to leave, he did so. Thereafter, Larson noticed that Smith's head was bleeding. A short time later, appellant returned and apologized to Kelleher.

Windy Murphy, the mother of Schwind's child, testified that, a day or two after Schwind's murder, Sommer refused to identify who he believed murdered Schwind. About a week later, people were pressuring Sommer for more information regarding the circumstances of Schwind's shooting, and Murphy again asked Sommer what happened to Schwind. Present at that conversation with Sommer were Michael Violette, Perrault, and James Burnett. Sommer said that as he and Schwind were siphoning gas, a truck pulled up; Carr and appellant ran out, and appellant started shooting at Schwind. Sommer said he did not see Carr shoot anyone. On cross-examination, Murphy said that she had heard Perrault speak about having firearms in his house, but Murphy had never seen them.

Former Contra Costa Deputy Sheriff Barnes testified he interviewed Sommer on January 11, February 6, September 7, and November 3, 2006. Perrault was present at the

start of the September 7 interview.[10] Later, while interviewed alone, Sommer said he was being a lookout while Schwind was siphoning gas. Reza's vehicle drove past them on Parker Avenue, made a U-turn and then approached them and stopped. As Sommer walked toward Reza's vehicle, he saw Reza and Edward in the front seat and two persons in the back seat who he could not identify. Reza then sped off down Parker Avenue and turned onto 6th Street. Within 30 seconds, appellant and Carr approached from near the Parker and 6th intersection. Sommer ran to the pickup, jumped in, and told Schwind to speed off. Sommer then heard gunfire and Schwind appeared to be shot. The pickup sped backwards, striking an object and stalling. Sommer then got in the driver's seat and tried to run down appellant and Carr. Sommer gave Barnes a nearly identical statement on November 3.

The Defense

On January 10, 2006, Scott Delozier, who has know appellant since grammar school, and appellant went fishing and then had pizza around 3:00 p.m. They then went to appellant's house and were together until 11:45 p.m. Delozier then went to buy dog food at the Safeway on Parker Avenue. At about 12:45 a.m., while Delozier was home feeding his dogs, he heard gunshots, which was not uncommon.

Appellant's girlfriend, Katie Barraza, was living with appellant in Crockett in January 2006. At about 9:00 p.m. on January 10, when she got home from work, appellant and Delozier were there and had brought home pizza. At about 11:00 p.m., Barraza and appellant went to bed. Appellant did not get out of bed until the next morning. Barraza said that, in early 2006, appellant had trouble walking due to ankle and leg injuries suffered in 2005. She also said that appellant did not use or sell methamphetamine and did not keep guns at home.

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10 Barnes testified that Perrault was in custody for the murder of Carr. The record does not reveal the date of Carr's murder.

Edward[11] testified he was not present at the time Schwind was killed and did not drive to Rodeo with Reza that night. He said he was probably at home at 1:00 a.m. on the day of Schwind's murder, but had told police he was probably walking his dog.

Debra Shibuya (appellant's sister), Steffan Cortez (appellant's brother-in-law), Brian Contestable (appellant's brother), Ed McGrath (appellant's cousin), and Francine Bremer (a family friend), all testified to appellant's reputation for nonviolence. On cross-examination, the prosecutor asked Shibuya, Cortez, and Brian Contestable whether their opinion of appellant's nonviolent character would change if they knew he and three other inmates assaulted another inmate. Shibuya and Cortez indicated it would not. Shibuya further testified she had been aware of the assault; "[h]e was a child molester and, you know, things are different in jail." Brian Contestable responded, "All I knew was someone told me this happened and that's all I know." He also seemed to excuse the incident by saying, "when people threaten other people's lives . . . just went along with the crowd."

Estrella denied knowing appellant, ever selling drugs to appellant or anyone, or burning appellant's truck. He admitted being on probation for unlawful sex with a minor, aggravated assault, and possession of methamphetamine.

Rebuttal

A week before testifying at trial, Richard Reza, Sr. (Reza, Sr.), Edward's brother, called Edward and asked if Edward was going to testify and what he would say if he testified. Edward said his testimony would be consistent with what he told the police. When Reza, Sr., asked Edward why he would not tell the truth and explained the ramifications of committing perjury, Edward said he had to live in Crockett and deal with people there. Edward said "it would be a lot easier if [appellant] would stand up." When Reza, Sr., asked, "Why don't you stand up?" Edward said he had been threatened.

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[11] Edward was arrested for conspiracy to murder Schwind, but was later released and not charged.

When Barnes interviewed Barraza in March 2006, Barraza said appellant had not been fishing on the day of Schwind's murder because his leg was hurt. When Barnes interviewed Delozier in March, Delozier denied being at appellant's house on the evening Schwind was murdered.

On September 1, 2007, Contra Costa Deputy Sheriff Flores was working at the county jail when he saw an inmate run from his room and up the stairs followed by a loud "thumping noise." Flores saw appellant and three other inmates beating another inmate, "Bettencourt." Bettencourt was "on all fours" trying to get away while the four inmates were standing over him and appellant was "stomping" on Bettencourt's back. When Flores yelled for them to stop, appellant and another of the assailants ran to a stairwell. Appellant ran up the stairs and stopped only when hit in the face with pepper spray. He had no problem running from Flores or using his foot to stomp Bettencourt.

DISCUSSION

I. *Defense Counsel Was Not Incompetent in Failing to Object to Certain Statements During the Prosecutor's Closing Argument*

Appellant contends his defense counsel committed ineffective assistance of counsel in failing to object to the prosecutor's "egregiously improper" statements during closing argument.

A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Prejudice is shown when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

Moreover, "[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions. [Citation.]" (*People v. Lucas* (1995)

12 Cal.4th 415, 442. "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

During closing argument the prosecutor made the following statements: "[Appellant] was going out; he pistol whips this guy Cecil. He tells Rich, he tells Jason that he now knows who did it. And lo and behold, two days later, they're both shot at, . . . Schwind is killed, the one that he was blaming for burning his truck. [¶] And we know that in the aftermath of that, that . . . Sommer finally told his friends who had done it. That it was [appellant], that it was . . . Carr, and they went for their revenge, and . . . Carr ended up losing his life also. [¶] . . . [¶] *Why on earth would . . . Perrault go after [appellant] and kill . . . Carr unless they were the ones who killed his best friend? That's what happened, folks. All because [appellant's] truck got burned two men lost their lives, . . . Schwind and . . . Carr.*" (Italics added.) Defense counsel did not object to the prosecutor's statements.

On appeal, appellant argues that the highlighted portion of counsel's statements constituted improper argument because they "focus[ed] the jury's attention on irrelevant matters and divert[ed] the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. [Citations.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Appellant also argues the prosecutor's statements "invited the jury to look away from the relevant evidence produced at trial and rely solely upon Perrault's special position as a kind of underworld figure in Crockett, whose special inside knowledge, privity and association with criminal affairs, made it certain that appellant murdered Schwind." He notes that no evidence was presented that Perrault was at the scene of the Schwind shooting or had knowledge of who shot Schwind. He therefore argues that the prosecutor's statements improperly referred to facts not in evidence and "involve[d] the use of deceptive or reprehensible methods to persuade the . . . jury. [Citation.]" (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

We disagree. The challenged statement makes no express or implied reference to "Perrault's special position as a kind of underworld figure in Crockett, [with] special inside knowledge, privity and association with criminal affairs." Instead, the statement seems to rely on Murphy's testimony that Perrault was present when Murphy asked Sommer what happened to Schwind, and Sommer responded that Carr and appellant ran out of a truck and appellant started shooting at Schwind, and that Sommer did not see Carr shoot anyone. Thus, we conclude the argument did not refer to facts not in evidence and trial counsel was not ineffective for failing to object that it did.

II. *Rebuttal Evidence Regarding Appellant's Violent Conduct Was Not Prejudicial*

Appellant also contends that defense counsel was ineffective in failing to object to Flores's rebuttal testimony regarding appellant's September 1, 2007 involvement in an assault at the county jail. He argues that this evidence was inadmissible character evidence under Evidence Code section 1101.[12]

Section 1101, subdivision (a), provides, "[e]xcept as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of . . . character . . . is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1102 provides that in criminal cases "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character," or "(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a)."

When a defense witness testifies about the defendant's good character traits, the prosecutor may test the validity of that witness's opinion or reputation testimony by asking whether the witness has heard of acts by the defendant that are inconsistent with the testimony, if the prosecutor has a good faith belief those acts occurred. (*People v. Hinton* (2006) 37 Cal.4th 839, 902 [after the defendant's mother testified the defendant

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12 All further undesignated section references are to the Evidence Code.

was a nonviolent person, the prosecutor could ask her whether she remembered the defendant shot a man after she told the defendant the man assaulted and robbed her]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1172-1173 [after character witness testified to the defendant's religious conversion and turning away from violence, prosecutor could ask her whether she knew of the defendant's possession of handmade knives while in prison].) However, section 1102 does not permit the prosecutor to rebut good character evidence presented by the defense with evidence of specific acts of misconduct. (*People v. Felix* (1999) 70 Cal.App.4th 426, 431-433 (*Felix*); 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 56, p. 388.)

Felix is particularly instructive. In that prosecution for possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)), two defense witnesses expressed opinions that the defendant used only heroin. Thereafter, on rebuttal, the prosecutor introduced evidence that the defendant had previously pled guilty to possessing heroin and cocaine for sale. (*Felix*, *supra*, 70 Cal.App.4th at p. 429.) The Court of Appeal reiterated that section 1102 "only permits character evidence in the form of an opinion or reputation." (*Felix*, at p. 432.) It concluded that the rebuttal evidence of the defendant's prior conviction for heroin and cocaine possession constituted evidence of a specific act and such specific act evidence is barred by section 1102. (*Felix*, at pp. 431-432.)

Here, after defense witnesses Shibuya, Cortez, and Brian Contestable testified to appellant's nonviolent character, the prosecutor properly asked them whether their opinion would change if they learned that, while in jail, appellant and three other inmates assaulted another inmate and, after that inmate tried to escape, assaulted him again until ordered to stop by a deputy sheriff. Subsequently, pursuant to CALJIC No. 2.42, the jury was instructed: "A witness has been asked on cross-examination if [he] [or] [she] has heard of reports of certain conduct of a defendant inconsistent with the traits of good character to which the witness has testified. These questions and the witness's answers to them may be considered only for the purpose of determining the weight to be given to the opinion of the witness or to [his] [or] [her] testimony as to the good [reputation] or [character] of the defendant. [¶] These questions and answers are not evidence that the

reports are true and you must not assume from them that the defendant did in fact conduct himself inconsistently with those traits of character." The instruction makes clear that the prosecutor's questions regarding the jail assault and the witnesses' answers were not evidence that the jail assault occurred. However, as in *Felix*, Flores's rebuttal testimony regarding the jail assault was improper evidence of a specific instance of appellant's conduct, barred by section 1102.

Nevertheless, we conclude that defense counsel's failure to object to the improper rebuttal testimony was not ineffective assistance of counsel because it is not reasonably probable that the jury would have reached a result more favorable to appellant had the testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence that appellant shot and killed Schwind was very strong. Reza and Lewis testified that when they asked appellant if he had killed Schwind, appellant said he had "emptied his clip." Appellant also told Reza he had shot Schwind "at pointblank range." Murphy testified that Sommer said appellant shot at Schwind and that Carr did not shoot at anyone.[13] In addition, evidence was presented that appellant suspected that Sommer and Schwind had set fire to appellant's truck the week prior, therefore establishing appellant's motive for the shooting. Finally, Lewis testified that prior to Schwind's murder appellant said he had pistol-whipped a "youngster" in an attempt to get information about his truck. The evidence of appellant's jailhouse assault is not any more inflammatory than the evidence that he pistol-whipped a "youngster" to extract information from him. Because appellant has failed to demonstrate prejudice, no incompetence of counsel is shown.

[13] This evidence is significant, in part, because it establishes Sommer had identified appellant as the killer before the prosecution offered him any leniency in his other cases.

DISPOSITION

The judgment is affirmed.

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SIMONS, J.

We concur:

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JONES, P. J.

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BRUINIERS, J.